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HISTORY REPEATED — SOME CONSIDERATIONS WITH REGARD TO THE BACONIAN SYSTEM OF JURISPRUDENCE.

It will be of more than usual interest in this day of conflicting opinions to note how history is merely repeating itself. The same kind of troubles which to-day is causing so much comment on the part of our best lawyers and judges, confronted Justinian. It is said: "As regards the *jus vetus*, the judges and practitioners of Justinian's time had two terrible difficulties to contend with: first, the bulk of the law, which made it impossible for any one to be sure he possessed anything like the whole of the authorities bearing on the point in question, so that he was always liable to find his opponent quoting against him some authority for which he could not be prepared; and secondly, the uncertainty of the law, there being a great many important points on which differing opinions of equal legal validity might be cited, so that the practicing counsel could not advise, nor the judge decide, with any confidence that he was right or that a superior court would uphold his view." From our own view point, we have the identical troubles on hand which were the plague of the lawyers and judges nearly fifteen hundred years ago, and of which there is justly so much complaint. The lawyer who can bring the most decisions on a given point before a court, wins his case as a rule. Recently we came across an opinion of one of our state supreme courts which upheld the previous rulings of that court with a seeming reluctance, because it was confronted with more opinions of other state supreme courts which held to the contrary. No effort was shown by the court to examine into the principles upon which the case was decided by the former opinions which disclosed most clearly and satisfactorily that they were correctly decided. We have frequently shown that lawyers and judges are giving more credit to the so-called weight of authority, no matter how decided, than to principles which were the basis of the court's opinions in earlier days. In the opinion we refer to, the court should have set forth the principles which guided it in its earlier opinions and standing upon them should have declared that, while generally it appears that the weight of decision is to the contrary, the weight of principle is with its own opinions, therefore, though ten to one decisions are presented which hold the contrary, it should have declared that the weight of the law was with it.

It is not hard to see that since the courts are neglecting to inculcate principles into many of the opinions which are being promulgated from so many states, the condition of our laws is growing worse and worse and the time is at hand when there is need of the application of the maxim that laws should be made to agree with laws. Since it is a hopeless expectation that this may be done by attempting to follow the conflicting decisions of the state courts, the only course left to the states is to adopt the opinions of the Supreme Court of the United States as authority. While there are opinions of the Supreme Court of the United States open to criticism, that court has been more careful to guard the fundamental principles of procedure and the general principles and maxims, better than the great majority of our state courts and is eminently worthy to be followed. The vast importance of securing the very best ability for this court can not be too strongly emphasized, in view, particularly, of the fact that its opinions must be regarded in order to bring all other courts into accord.

The volume of the civil law we now call the digest or pandects is generally recognized as far the most precious monument of the legal genius of the Romans and is said to be, "whether one regards the intrinsic merits of its substance or the prodigious influence it has exerted or still exerts, the most remarkable law book the world has seen." Encyclo. Britannica, Vol. 13, p. 802. Bacon recognized the Roman as the source of our own laws. Bacon's wisdom as the best means of keeping the channels clear of rubbish will yet be credited. Bacon himself said: "I am in good hope that when Sir Edward Coke's reports, and my rules and decisions shall come to posterity, there will be (whatsoever is now thought), no question as to who was the greater lawyer." It is absolutely certain

that Coke's plan of following precedent, has led to bad results in England, which were, to a great extent, cleared by the superb opinions of Lord Mansfield through the application of the maxims and principles which Bacon regarded necessary to be applied in order to give life to the law. The most satisfactory decisions of the present time, as a rule, are those which are enlivened by the maxims gathered from the Roman. The opinions of the Supreme Court of the United States are full of them.

If the opinion of Mr. Justice Brown, upon retiring from the United States Supreme Court may be regarded as that of the whole court, the technicalities which have grown up from case opinion and put into use to subvert justice, particularly in criminal cases, must be done away with. In order to do this we must resort to the Baconian theory of rules which, not like set opinions, may expand to the needs of justice. Thus we are compelled to put ourselves on the side of Bacon and declare it as our belief (as between himself and Coke), that he was "the greater lawyer." In view of the works of the two men, it is impossible to credit Coke with greater wisdom than he who is recognized as the greatest utilitarian of the ages. At any rate we are suffering too much of the Coke idea, or in other words too much precedent, which way is not calculated to expand to the needs of justice.

NOTES OF IMPORTANT DECISIONS.

LIBEL—LIBELOUS WORDS PER SE.—In the case of Chambers v. Leiser (Wash.), 86 Pac. Rep. 627, it seems that a stockholder of a corporation wrote a letter to another stockholder with reference to the conduct of an officer of the corporation. The three persons were physicians. The letter alleged that the officer was seeking to wreck the corporation, and that he had turned over to it worthless land for $1,000, and stated: "Between you and me my professional opinion about the officer is * * * that he is just a little bit daft." The court said: "We do not think the contents of this letter, taken by themselves, tended to show anything that would render the communication not privileged. Consequently the burden of proving malice, knowledge of falsity, recklessness, or the use of impertinent or unnecessary libelous matter, or other legal abuse of the 'occasion of privilege,' was upon plaintiff. It was therefore incumbent upon plaintiff, by means of the matters in the letter or by any other competent evidence, to show that defendant had been actuated by malice or ill-will towards plaintiff, or had included in said communication false and libelous matters not pertinent or reasonably necessary to the subject-matter which it was defendant's privilege to communicate, or that defendant had not made reasonable inquiry and investigation, but had written recklessly or knowingly falsely and not in good faith; and upon establishing any of these matters, the plaintiff would have been entitled, on account of the presumption of malice, falsity and injury arising from the matter libelous *per se*, to recover, unless the defendant should have established the truth of the letter's libelous contents. Urban v. Helmick, 15 Wash. 155, 45 Pac. Rep. 747, 15 Enc. Pl. & Pr. pp. 105, 107; Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. Rep. 1049, 18 Am. & Eng. Enc. of Law, pp. 909, 925, 929, 942, 1050; Townsend, Slander & Libel, §§ 145, 208-212; Locke v. Bradstreet (C. C.), 22 Fed. Rep. 771; Comfort v. Young, 100 Iowa, 627, 69 N. W. Rep. 1032; Briggs v. Garrett, 111 Pa. 404, 2 Atl. Rep. 513, 56 Am. St. Rep. 274; Perkins v. Mitchell, 31 Barb. (N. Y.) 461; Harrison v. Garrett (N. C.), 43 S. E. Rep. 594; Atwater v. Morning News (Conn.), 34 Atl. Rep. 865; Newell, Defamation, p. 389 *et seq.* Some other errors are alleged, but we do not think the assignments well taken. By reason of the error above mentioned the judgment of the honorable superior court is reversed, and the cause remanded for a new trial."

LARCENY — CIRCUMSTANCES UNDER WHICH POLITICAL SUBSCRIPTION FROM CORPORATE FUNDS IS LARCENY.—Section 528 of the New York Penal Code provides in part: "A person who, with intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker or any other person * * * having in his possession, custody or control as * * * officer of any * * * corporation * * * any money, * * * appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny." The relator, vice-president and a member of the finance committee of the New York Life Insurance Co., was arrested under this statute for larceny of the company's funds. He brought writs of *habeas corpus* and *certiorari*, to test the sufficiency of the depositions on which the magistrate issued the warrant. The depositions showed that the defendant received money from the funds of the company as reimbursement for money advanced by him as a campaign contribution, on behalf of the company, to the Republican national committee. The books of the company did not disclose the purpose of the payment to the relator. The relator further deposed that he received no personal advantage from the transaction, that he acted solely in the interests of the company and with-

out misgivings as to the propriety of the act, believing a Republican victory essential to the prosperity of the company. The action of the finance committee in assenting to the repayment was purely informal. The court dismissed the writs on the ground that the depositions showed evidence sufficient to warrant a jury in finding that the relator had been guilty of larceny under the statute. People *ex rel.* Perkins v. Reardon, 35 N. Y. L. J. 226 (N. Y. Sup. Ct., April 10, 1906).

It is evident that the statute demands a specific intent to deprive the owner of his property (People v. Moore, 37 Hun (N. Y.), 84), and clearly the depositions of the relator to the effect that he had no suspicion of the illegality of his acts and acted for the sole purpose of benefiting the corporation are inconsistent with the existence of such an intent. It would appear, therefore, that what the court had to decide was simply whether the other facts deposed to were such as might justify a jury in finding that the above assertions of the relator were untrue.

The reasoning by which the court arrived at its conclusion is not altogether free from uncertainty. A large portion of the opinion is devoted to emphasizing a distinction between *ultra vires* acts illegal in themselves as against public policy and those merely unauthorized. If the distinction is taken merely to show that the specific intent to defraud is more easily inferable from the former sort of *ultra vires* acts this is undoubtedly correct. Much, however, that the learned judge says on this point may well leave it doubtful whether he is not proceeding on the theory that the illegality of the act supplies the necessary criminal intent. If this is, indeed, the theory of the decision it would seem manifestly incorrect, for, the required intent being specific, the doctrine of constructive intent has no application. See May's Crim. Law (2nd Ed.), § 34; see Dobbs's Case, 2 East P. C. 513.

In short, proceedings under this statute do not seem to involve the law of *ultra vires* at all, except in so far as the moral quality of the particular *ultra vires* act in question may aid in ascertaining as a fact the intention with which it was done, or, concretely, in negativing the relator's professions of ignorance of the law, and of benevolent intentions. From this point of view the distinctions drawn by the court between different sorts of *ultra vires* acts were perhaps relevant, and the facts deposed to would certainly seem to have warranted the dismissal of the writs.—*Harvard Law Review.*

EXIGENCIES WHICH SEEM TO REQUIRE THE CALLING OF A CONSTITUTIONAL CONVENTION IN MISSOURI.*

The subject I desire to discuss is that of calling a constitutional convention in order to frame a new constitution for the people of the State of Missouri. There are many reasons which indicate and many necessities which impel the calling of such a convention and the framing of such an instrument.

Although Section 41 of Art. IV of the constitution makes provision that "all the statute laws of a general nature, both civil and criminal, shall be revised, digested and promulgated in such manner as the general assembly shall direct," yet there has not been a revision of the statutes since the revision of 1845, a period of over sixty years, which, paraphrasing that celebrated telegram from the governor of North Carolina to the governor of South Carolina, is a long time between revisions.

The framers of the present organic law do not seem to have been very prescient when framing section 41, or else they could not help but know that the legislature would appoint some of their own number to make the decennial revisions, and so it had turned out. As every lawyer knows, it is wholly impossible for a large legislative body to accomplish a revision of the statutes. What have been the results of such absence of foresight on the part of our constitution makers? These: The legislature, pressed with legitimate legislative work, had no time to revise the statutes, and so after some perfunctory work, turned the matter over to a sub-committee, who had no power to revise the statutes themselves, but only "the power of suggestion," and so in the brief period of one hundred and twenty days a revision of the statutes is said to have been made, when the truth hath it

* It will not be uninteresting to lawyers in other states than Missouri, to learn from such a prominent jurist as Judge Sherwood, for over twenty-five years one of Missouri's greatest judges, what he regards as exigencies which require the calling of a constitutional convention. This address was delivered recently before the St. Louis Bar Association, and evidences that same beauty, clearness and piquancy of style which has exalted the opinions of this able jurist outside of his own state to a degree not even approximated by any other judge of the Supreme Court of Missouri.

that such a revision was only an aggregated and aggravating compilation of statutes abounding in incongruities, inconsistencies, contradictions, repetitions and retentions of statutes held constitutionally invalid, and constitutionally invalid, though not so held.

Looking alone to the criminal statutes of the state, we find frequent instances where the very same act is made both a felony and a misdemeanor. Sometimes this occurs in the very same article and in contradictory sections but a short distance from or immediately succeeding each other. Of course, if these sections were both enacted at the same time, the result would be that one section would nullify the other and no punishment could be inflicted, because it would be the old case of an irresistible force striking at an immovable body, and any crime committed in the interim would be non-punishable. If, however, one of the sections was passed later than the other, then the latter section, so far as repugnant, would prevail,[1] thus turning the felony into a misdemeanor, or *vice versa*.

Scattered all through the statutes from treason, in chapter 15, volume 1st, to thistles, in chapter 166, volume 2d, R. S. 1899, may be found felonies and misdemeanors of every color, shape, size and variety, and not confined by any means to the chapter relating to crimes. If we could ever have a revision of our statutes, then these crimes of high and of low degree would be winnowed out from their present misplaced locations, and placed under proper and appropriate heads in the chapter treating of crimes and punishments.

There is no one to-day on the bench or off the bench who is not frequently hard pressed to ascertain what general laws are now in force on some particular subject in this state. But on the face of our revised statutes all questions of this nature should be definitely settled, and every statute there found should actually, as well as apparently, be the general law. The enormous bulk of our statutes, over four times the size of the statutes of 1845, could readily be reduced and with benefit to one-third the size of the present revision if all repetitious, redundant, inconsistent, superfluous, obsolete and unconstitutional statutes were eliminated from those which would remain after such much needed expurgation had run its course. Under the prudent and pruning hands of competent revisors the bulk of many chapters could be reduced from one-third to one-half, with positive benefit in the way of clearness, accuracy and precision. But judging from a long and disappointing experience in the past, we need not hope for a true and real revision of our statutes unless we can have a new constitution, which will, in a manner free from interference by incompetent legislators, give us men thoroughly equipped for the work, and who, with ample time conceded them, will thoroughly perform that work. And in such new constitution it should be provided that such revision, when accomplished and reported to the legislature, should not be changed for a term of years, except upon a vote of two-thirds majority cast in joint session of both houses. This matter thus arranged, would give us surcease from the interminable flood of repetitious, repugnant and unconstitutional legislation, and would, in and of itself alone, afford ample grounds for calling a constitutional convention.

Other reasons suggest themselves for calling such a convention. When what is known as the odious "Drake oath" was imposed on the people of this state, there could be offered as an excuse for its existence and as a mitigation of its infamy, the fierce passions engendered during the greatest civil war this world has ever witnessed, which war had then but recently ceased. But after ten years had gone by and profound peace reigned supreme over our land, a constitutional convention assembled at the capitol of this state and in the organic law then and there framed, ordained that every senator and representative elect should, before entering on the duties of his office, take and subscribe the following oath or affirmation: "I do solemnly swear, or affirm, that I will support the constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office; and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

This oath is not required to be taken by any other officer under the government of this

[1] State v. Taylor, 186 Mo. 608.

state. Why then, directed against our legislators alone? The reason is near at hand; it indubitably indicates in the minds of the framers of our organic law a profound distrust of the members of the popular branch of this government. It points at each and every legislator in this state the slow and unmoving finger of anticipatory felony. To the meanest criminal in our courts is accorded the beneficent presumption of innocence, while from each of our legislators, before he can enter on his official duties, is exacted a prophylactic oath against his own presumptive infamy. Why was not the same oath required of every other officer? And why was not the violation of the official oath of other officers made "perjury," just as it is in the case of legislators? When shall the foul stain of this oath be wiped from the face of our organic law?

Other reasons furnish an emergency clause for calling a constitutional convention, to-wit: The reformation and reconstruction of our judicial system in this state. That system, to dignify it by that name, is in a sadly decadent condition at the present writing. Under section 6 of article VI. of the amendments of our constitution, when one of the courts of appeals renders a decision which any one of the judges of that court deems contrary to any previous decision of any one of said courts of appeals or of the supreme court, it is made the duty of such court of appeals to certify the cause to the supreme court. But it is said that some of the judges of the courts of appeals seldom make a statement that they deem a certain opinion contrary, etc., and so certification of causes to the supreme court seems to be rare. The result is that in circuits divided by the jurisdictional line between the St. Louis Court of Appeals and the Kansas City Court of Appeals, the circuit judge of such circuit thus divided, decides on the west side of that line in accordance with the views of the Kansas City Court of Appeals, and on the east side of that line in conformity with the rulings of the St. Louis Court of Appeals, which result is only too admirably adapted to bring the administration of the law into contempt. This evil can only be remedied by a change in the organic law.

The supreme court is overburdened with work; more causes involving grave constitutional questions are brought before it now in five years than came before it in a half century of its previous history. Besides, other grave questions of great pith and moment daily challenge attention and demand solution. It is but natural in such a posture of affairs that judges overburdened and overworked, should in the laudable endeavor to dispose of a crowded docket, sometimes dispose of causes with more rapidity than their importance renders requisite. In short, our judges do more work than should be done in order to attain the best results. To remedy this situation and relieve this exigency, it seems quite obvious that nothing short of a constitutional change can bring it about: First, by enlarging the number of judges of our supreme court by the addition of two more members, so as to form three divisions of three each, giving to the first of such divisions exclusive jurisdiction of all criminal causes whatever and the issuance and determination of all original remedial writs. Second, giving to the other divisions power to issue such original writs in aid of their appellate jurisdiction. Third, to dispose of all other business not belonging to the first division. Fourth, that any division having disposed of its docket, should aid any other division requesting such aid. Fifth, providing that when any constitutional question has been disposed of, such disposition shall stand, unless one or more judges of the other divisions request that such cause be removed to court *in banc*, or the defeated party shall apply according to rule, for such removal, or the court *in banc* shall order such removal. Sixth, prohibit any cause going to court *in banc* or to any division, as involving a constitutional point, unless such point be actually involved, and if not involving it and no jurisdiction otherwise, appeal dismissed. Seventh, provide for swift and mutual interchange between divisions of head-notes and names of all causes decided. Eighth, make provision for cutting down the record presented in all civil causes so as to present a simple and concise statement of the pleadings and facts, signed by counsel, and to constitute the entire record. Such a rule prevails in the State of Georgia and with such effect that the judges of the supreme court of that state readily write 150 opinions each in the course of the year. Such a rule, ordained by our organic law, would readily cut off what

occurs now on almost every appeal, the dispute over what facts are contained in the cause, and obviate the "patient search and vigil long" through vast Saharahs of arid and barren records, in order, if possible, to discover the existence or non-existence of some minute but vital fact, upon which, as upon a pivot, the whole cause turns. Such cruises of discovery belong not to the legitimate labors of a court of last resort. Ninth, to enlarge the jurisdiction of the courts of appeals in all actions for personal or other injuries. Tenth, to so limit the right of appeal to the courts of appeals as to cut off such right in a certain class of cases.

Other grounds for calling a constitutional convention are yet to be mentioned. Every year or two witnesses the assembling of "good roads" conventions in this state. Of course, under our present constitution such assemblages may be very laudable as promotive of "social culture," but as to raising taxes for building roads they are *nil*. And yet the good people who compose these conventions are wholly unable to understand the obstacle that stands in their pathway and makes futile all their endeavors. What a pity it is in this great utilitarian age and era of mechanical inventions, conveniences and contrivances, that very useful instrument, the pile-driver, could not be employed as a means of compulsory education. Turnpikes are proverbially termed "farmers' railroads," and so they are. With a proper constitutional provision, we could have built a state system of macadamized roads all over this state, so that a man could get on a turnpike at Kahoka, in Clark county, and remain on it until reaching "Southwest City," in the extreme corner of McDonald county. But such a system of turnpikes could only be built with money or its equivalent. Non-negotiable, nontaxable bonds could be issued, bearing four per cent interest, and having thirty years to run, and could be floated nearly at their face value, and which could be pledged, but not sold, until a decree of the circuit court of each particular county should establish that the bonds of such county had become negotiable in consequence of the completion of the work specified on the face of such bonds; the substance of such decree, together with the signature of the clerk and seal of such court being indorsed on the bonds; said bonds to be retained in the state treasury for the use of whomsoever it might concern until the entry of such decree.

Whenever an old watch or an old wagon has to be often taken to the shop for repairs, this is regarded as evidence that a new one is demanded. Why does not the same rule hold good in regard to a much betinkered constitution? Is it not a mere human institution? And yet, to hear its framers and their friends, they speak of it with bated breath; they speak of it as the Hebrews of old spoke of the ark of the covenant of God. Profane hands may not touch it but at the peril of instant death. I have endeavored to construe our constitution for over twenty-five years; and whenever I think of it I am reminded of what one Greek said to another. It seems on the previous night an orator had made a speech at the Parthenon at which one Athenian had not been present, so with Athenian curiosity of the regulation pattern, "to see and hear some new thing," he approached a Spartan who had been present and asked him how he liked the speech of the previous evening, when with laconic directness the Spartan replied: "What was new in it was not good, and what was good in it was not new."

The framers of the constitution of several of our sister states were not of opinion that all wisdom would perish with them, and so in order to make the calling of a convention an easy matter, they made it an express duty of the general assembly to provide by law for calling on the people of the state at stated times to say whether they wished a constitutional convention called or not. Thus: The constitution of Maryland of 1867, article 14, section 2, provides: "It shall be the duty of the general assembly to provide by law for taking, at the general election to be held in the year 1887 and every 20 years thereafter, the sense of the people in regard to calling a convention for altering this constitution; and if a majority of voters at such election or elections shall vote for a convention, the general assembly at its next session shall provide by law for the assembling of such and for the election of delegates thereto; but any constitution or change of amendment of the existing constitution, which may be adopted by such convention, shall be submitted to the voters of this state, and shall have no effect unless the same shall have been adopted by a

majority of the voters voting thereon." The constitution of Ohio, 1851, article 16, section 3, provides, that in 1871 and each 20th year thereafter, the question, "Shall there be a convention to revise, alter or amend the constitution?" shall be submitted to the electors of the state. If voted yes by a majority of those voting, the convention shall be called. The constitution of Iowa, 1857, article 10, section 3, provides, that in 1870 and in each tenth year thereafter, the question, "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to the people, and if favorably voted upon, shall be called."

It will be noted that although our constitution, section 2, article 2, called our bill of rights, declares: "That the people of this state have the inherent, sole and exclusive right * * * to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness," etc. Yet, on turning over to section 3, article 15, we find that to the legislature alone is confided the initiative of calling a constitutional convention, while the people of this state, notwithstanding the power professedly granted to them "to alter and abolish their constitution whenever they may deem it necessary," etc., are utterly powerless to do anything of the kind unless the legislature graciously give them permission to do so, by a law passed to that effect. More than that, section 3 goes on to say that the general assembly shall have no power otherwise than in this section specified, to authorize a convention for revising and amending the constitution."

Whatever may be the merits or demerits of our present constitution, it does not meet the wants and demands of the present hour. In the first place it was framed at a most inauspicious time; at that juncture this state was overshadowed by the darkness of the then recent panic of 1873. In the second place, at that time nothing was known of those terrible combinations of capital and crime, called trusts, which now threaten to eviscerate this nation of its liberties.

We need a change in our organic law in order that the state, if desiring it, can have a change of venue as well as a defendant. All that the latter is entitled to is a fair and impartial trial, and this means the same kind of trial on the part of the state. Such a change, with accompanying liens for civil damages on all the lands and other property in the county where a lynching occurs, would go far to wipe out a crime non-punishable by reason of the fact that public sentiment in the county of its perpetration is too strongly in favor of its perpetrators to admit of their punishment. Change the venue and you change those conditions. To show the gross and monstrous injustice inflicted by that provision of our constitution as interpreted in Slater's case, that no crime can be punished except on indictment found in the county where done, I will give an outline of that case. A man was put on trial for his life in Clark county. He was acquitted of the charge by a jury, and in one short hour he was seized and hanged by a mob. No indictment could be found in the county, and so the judge of the circuit court of that county, acting under the provisions of a statute then in our statute books, certified the cause away to Audrain county, where Slater was indicted and imprisoned. He was released by our supreme court on *habeas corpus*. No civilized country should bear the disgrace of failing to provide means to punish murderers, and yet of such disgrace and for similar criminal acts rendered by our constitution non-punishable, and for acts yet to come, of a like nature, this state must bear the direful burden.

Finally:—Experience having demonstrated in so many instances, that whether acting under democratic or republican rule, our large cities are incapable of self-government, or if capable, such capability is accompanied by such circumstances of reckless and wasteful extravagance and widespread corruption, resulting in vast and rapidly increasing municipal indebtedness and consequent and proportionate taxation, yearly becoming more onerous to bear; this fact suggests, nay demands, relief in a form adequate to the exigency of the situation. Such relief can only be brought about by a change in our organic law, which will take away the autonomy from our large cities. The city of Galveston gives illustration and pregnant example of what success will attend a movement of this kind. That city, practically destroyed, as is well remembered, has practically been restored, rebuilt, reinstated, as well as abundantly protected against similar disasters in the future,

merely by giving the reins of power into the hands of a commission to manage the affair; and that has been managed at a great percentage in saving, both in cost and time, far under what would have been necessary had matters been left in the hands of a slow-moving or recalcitrant common council and general assembly. Had such matters remained in customary hands, in all probability those legislative bodies of that city would have been to-day still debating the best plan for the stricken city's restoration, without a single spadeful of earth having been thrown, or a single stone set in place.

Of course, were a system inaugurated, that of changing the usual method of municipal rule, as here contemplated, it would, by an easy transition, banish from sight many a familiar object thought indispensable under the present regime. Like overturning in the forest some old log, thereby disclosing many a pestiferous weevil, bug and larva of unsuspected existence, it would bring into the glare of sudden disclosure and discovery many a leak, abuse and nefarious method hitherto kept in undisturbed and restful concealment. And it would cause, through lack of occupation, the absence of "Lo" and his associate aborigines from the municipal polls. It would also cause the non-assembling of that phenomenally wonderful body of men, the police commissioners, who, strictly obedient to the law of their organization, were never known to interfere in politics, except, *pro re nata*.

Mr. President and Gentlemen of the St. Louis Bar Association: I have been greatly honored by your kind request to address you on this occasion, but I think your choice would have been wiser had it fallen on a younger man, and to him the task had been alloted, and not to one whose wine of life is on its lees. It is but natural that we all would rather greet the morning sun, as he comes from his home in the jocund east, rejoicing in his strength, wheeling his broad refulgent disc up the steep of heaven, chasing before his radiant face the murky shadows of darkness and awakening on every hill top and in every valley, "The breezy call of incense breathing morn," than to greet him as he sinks slowly and sullenly down behind the western hills, spent as it were with the labors of the day, while the gloomy shades of night gather round him, shorn of his beams and robbed of his splendor.

Springfield, Mo. T. A. SHERWOOD.

JUDGMENT — SAME EFFECT GIVEN TO FOREIGN AS TO DOMESTIC JUDGMENTS.

ROBERTS v. LEUTZKE.

Appellate Court of Indiana, October 3, 1906.

Where a complaint on a foreign judgment showed that in an action commenced by plaintiffs against defendant in the circuit court of M. county, Wis., defendant entered a full appearance, that on the trial the judgment sued on was rendered, and that the Wisconsin court was a court of general jurisdiction, the complaint was sufficient to require an answer, though it contained neither copies of the pleadings nor allegations showing that the judgment declared on was responsive to the issues.

Where the transcript of a foreign judgment, though not containing the pleadings and issues, was properly authenticated, as required by Burns' Ann. Stat. 1901, secs. 458, 479, and exhibited an entry of a personal judgment by the circuit court of M. county, Wis., in favor of plaintiff and against defendant for a specified sum, it was properly admitted in evidence in a suit on such judgment, and was *prima facie* evidence of the debt.

Where, in an action on a foreign judgment, it sufficiently appeared from the transcript that the judgment declared on was rendered by a court of record, it would be presumed that such court was a court of general jurisdiction, had jurisdiction of the subject-matter of the action and the parties thereto, and rightfully gave the judgment sued on.

In an action on a foreign judgment, jurisdiction while presumed, is nevertheless a subject open to inquiry, and may be collaterally attacked.

MYERS, J.: The complaint in this case is in one paragraph, and is founded upon a judgment rendered in favor of appellees and against appellant in the circuit court of Manitowoc county, Wis. The overruling of a demurrer to the complaint is assigned as error. Appellant contends that the complaint is defective for the reason that it does not disclose the cause of action or subject-matter in controversy before the Wisconsin court. According to appellant's theory, in order to make this complaint good, it should contain copies of the pleadings, or at least allegations showing that the judgment declared on was responsive to the issues. The complaint now under consideration shows that in an action commenced by appellees against appellant in the circuit court of Manitowoc county, Wis., appellant entered a full appearance, and upon a trial of that cause the judgment herein sued on was rendered, and that the Wisconsin court is a court of general jurisdiction. Upon the authority of Gates v. Newman, 18 Ind. App. 392, 46 N. E. Rep. 654, the complaint in the case at bar is sufficient to require an answer.

The second and only other error assigned by appellant is the overruling of his motion for a new trial. Considering the reasons assigned by appellant for a new trial in the order by him discussed, our attention is called (1) to the ruling of the court in admitting in evidence, over his ob-

jection, the transcript of the judgment of the Wisconsin court. This transcript does not contain the pleadings and issues tendered in that court, and upon that ground appellant bases his objection. That the transcript is properly authenticated under sections 458, 479, Burns' Ann. St. 1901, and exhibits an extry of a personal judgment given by the circuit court of Manitowoc county, Wis., in favor of appellees and against appellants, for $3,884.85, is unquestioned. This being true, it was properly admitted in evidence (Lieb v. Lichtenstein, 121 Ind. 483, 490, 23 N. E. Rep. 284; Bailey v. Martin, 119 Ind. 103, 21 N. E. Rep. 346), and was *prima facie* evidence of the debt herein sued on. Holt v. Alloway, 2 Blackf. 108.

The second reason discussed by appellant in support of his motion for a new trial is that the decision of the trial court is not sustained by sufficient evidence and is contrary to law. It is a familiar rule of law that all presumptions and intendments are to be indulged in favor of the regularity of all the acts and proceedings of courts of general jurisdiction, that they have jurisdiction to give the judgments they render, and that such judgments are according to the laws of the state where had. In the case at bar it sufficiently appears from the transcript that the judgment declared on was rendered by a court of record, and being a court of record, it is presumed to be a court of general jurisdiction (Old Wayne, etc., Association v. McDonough, 164 Ind. 321, 330, 73 N. E. Rep. 703); and applying the rule just stated, it is presumed to have jurisdiction of the subject-matter of the action and of the parties interested (Old Wayne, etc. Association v. McDonough, *supra*; Gates v. Newman, *supra*), and to have rightfully given the judgment sued on (Runner v. Scott, 150 Ind. 441, 50 N. E. Rep. 479; Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959). While jurisdiction may be presumed, it is nevertheless a subject open to inquiry, and may be attacked in a collateral proceeding. Grover, etc., Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34 L. Ed. 670; Thormann v. Frame, 176 U. S. 350, 20 Sup. Ct. Rep. 446, 44 L. Ed. 500; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; American, etc., Ins. Co. v. Mason, 159 Ind. 15, 64 N. E. Rep. 525; Long v. Ruch, 148 Ind. 74, 47 N. E. Rep. 156; Runner v. Scott, *supra;* Gates v. Newman, *supra*. The Wisconsin judgment is fair on its face, and the burden of showing a want of jurisdiction in the court rendering it was upon appellant. By his affirmative paragraph of answer to the complaint herein he challenges the validity of the judgment in suit upon the theory that no pleading or issue before the Wisconsin court authorized a personal judgment against him, and therefore the finding and judgment of the court in that respect was not only irregular, but *coram non judice* and void. The settled law in this state is that a "judgment is conclusive upon all questions which were or might have been litigated and determined within the issues before the court." Maynard v. Waidlich, 156 Ind. 562, 570, 60 N. E. Rep. 348, and cases cited. But where the judgment is not responsive to the issues and not the adjudication of a subject included in them, it will be considered irregular and void. McFadden v. Ross, 108 Ind. 512, 8 N. E. Rep. 161, and cases cited; Hutts v. Martin, 134 Ind. 587, 33 N. E. Rep. 366; Whitney v. Marshall, 138 Ind. 472, 37 N. E. Rep. 964; Bremmerman v. Jennings, 101 Ind. 253, 257; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. Ed. 464; Pray v. Hegeman, 98 N. Y. 358.

Appellant introduced in evidence a transcript of all the pleadings, proceedings and judgment in the Wisconsin court. From this transcript we learn that on June 22, 1903, appellees commenced a suit in equity in the circuit court of Manitowoc county, Wis., wherein appellant and others were defendants. The complaint alleges in substance that a certain firm of lawyers, residents of Manitowoc county, and parties to the action, have in their possession, as agents of the firm of which appellant was a member, three notes of $1,000 each; that appellees' signatures were obtained to said notes through false and fraudulent representations made to them separately and individually by appellant's agent, one O'Connell, and upon an agreement with O'Connell that said notes would not be delivered to his principal and have validity until each had been signed by all the parties subscribing for stock in a company being formed for the purpose of purchasing a stallion, property of appellant's firm, and then in the possession of said O'Connell, as their agent; that unless said notes were signed by all the parties aforesaid they were to be returned to the subscribers and destroyed; that a number of the subscribers for stock in said proposed horse company refused to sign, and never did sign, said notes; that on March 5, 1903, O'Connell delivered said stallion to one of the appellees, to be held by him for all who had subscribed for stock, and upon condition that all who had subscribed for stock should join in the execution of said notes; that said O'Connell, contrary to the agreement and conditions upon which appellees signed said notes, delivered the same to his principal, who took possession thereof, and who, on and after March 6, 1903, claimed to be the owner and holder thereof; and that the same were legal and valid claims against appellees, and were attempts to sell and negotiate the same to innocent third persons, so as to cut off, if possible, appellees' defense thereto. The complaint also contains allegations relative to said agent's representations as to said horse being sound and free from disease at the time he was delivered to appellee, and as to his unsoundness and diseased condition at that time, and as to certain subscriptions for stock being fraudulent, which were by said agent represented to be *bona fide*, also allegations relative to appellees' demand upon appellant for the return of said notes and their offer to surrender said stallion, and claiming expense for his keep, and

closes with the following prayer: (1) That said firm of attorneys, naming them, also the members of appellant's firm, "be each perpetually restrained and enjoined from selling, negotiating or otherwise transferring the said notes, or any one of them. (2) That said notes, and each of them, be surrendered into court and cancelled. (3) That a temporary injunction be issued, restraining and enjoining the said defendants * * * from selling, negotiating, transferring or parting with the possession of said notes, or any of them, during the pendency of this action, and until the further order of court. (4) For their damages in the sum of $300, and for the costs and disbursements of this action. (5) For such other and further order, judgment and relief as the court, upon the proof, may deem just and equitable." Said firm of lawyers answered by admitting that they were in possession of said notes; that they had received the same from the Citizens' National Bank of Attica, Ind., through the Manitowoc Savings Bank of Manitowoc, Wis.; that they have no interest in said action and are willing and ready to deliver the notes to whoever may be entitled to the same. This transcript further shows that one Alvin P. Nave and the Citizens' National Bank of Attica, Ind., were admitted as parties defendant to that action, and each filed a separate answer showing that, prior to the commencement of the action, and in the due course of business, and for value, said notes had been transferred by appellant's company to Nave, and by Nave to said bank, and that said bank was then entitled to the possession of the same. The transcript also shows that appellant answered the complaint, admitting that he and others were partners, doing business at Westfield, Ind., at the time appellees' alleged cause of action accrued, but that subsequent thereto, on October 7, 1903, said partnership was dissolved; that he had possession of all the partnership property for the purpose of closing up its affairs. Said answer further shows that said partnership, through their agent and servant, O'Connell, in the spring of 1903, desiring to sell one of their stallions, solicited and obtained from persons, including all of appellees, subscriptions for 30 shares or interests in said horse, when purchased at $100 per share; that by said subscription each and every subscriber thereto promised, on the delivery of said horse to the company then forming, to pay the purchase price therefor by executing to appellant's company joint notes, drawing interest, and payable one-third in one year, one-third in two years and one-third in three years, and if they failed to immediately join in the execution of such notes, then the whole sum, to-wit, $3,000, to become immediately due and payable in cash; that immediately after the signing of this contract said subscribers, at a meeting in which all participated, formed a company and elected from their number a president, secretary and treasurer; that thereafter and about March 6, 1903, at said county of Manitowoc, "said defendants, relying upon said subscription contract of these plaintiffs, and of the defendant John Guttman, and of their said horse company, sold and delivered to the plaintiffs herein and the defendant John Guttman one imported French Percheron stallion * * * for the agreed sum of $3,000, and which said plaintiffs and the defendant John Guttman and their company agreed to pay in the manner and at the time as hereinbefore stated, and which was a fair and reasonable price therefor;" that thereafter and upon demand the three notes in suit were executed and delivered, and in conformity with their said agreement and contract. The answer further shows the transfer of said notes for value, and in the due course of business by appellant's firm, before maturity, and prior to the beginning of the action, to one Alton P. Nave, and by Nave to the Citizen's National Bank of Attica, Ind.; that appellant's firm obtained said notes from the makers thereof in good faith and for value and in the due course of business, and not by fraud or misrepresentation; and after denying all allegations in the complaint not admitted or controverted, demands that the action be dismissed as to them, with costs.

The pleadings, of which we have endeavored to give the substance, cover more than 40 typewritten pages of the record, and in our judgment exhibit facts showing that the Wisconsin court had jurisdiction of the person of appellant. Such jurisdiction, if the issues and facts so warranted, authorized the court to enter personal judgment. The case was one based upon appellant's fraud, and brought in a court of equity. Specific and general equitable relief was demanded. Fraud is a subject of equity jurisdiction, and upon the facts pleaded a court of equity works out the rights of the parties before it. In the case at bar it will hardly be denied that the Wisconsin court had the power to determine the rights of the parties upon the facts pleaded; and this being true, any relief it might give by reason of such facts may properly be said to be in issue, and therefore within the rule requiring jurisdiction of the subject-matter and of the person. The Wisconsin court rendered a personal judgment against appellant, and the presumption is that it was according to the facts pleaded as disclosed by the evidence at the trial. Exact justice between the parties being the purpose of a court of equity, it will not do to say that its power to grant relief can be circumscribed by any fast or technical rule. The rule expressed by the court in Real Estate Savings Inst. v. Collonious, 63 Mo. 290, 295, that such court "will not content itself in this regard by any halfway measures. It will not declare that a party has been defrauded of his rights and then dismiss him with a bland permission to assert, at new cost and further delay, those rights in another forum" (citing authorities)—is quite applicable here and expressive of our views. The same principle as announced by the Missouri court was ruled in the cases of Wade v. Bunn, 84 Ill. 117; Martin v. Martin, 44 Kan. 295, 24 Pac. Rep.

418; Odd Fellows' S. Bank's Appeal, 123 Pa. 356, 365, 16 Atl. Rep. 606, and McCalmont v. Lawrence, 1 Blatchf. (U. S.) 232, Fed. Cas. No. 8,676. See also 1 Pom. Eq. Jur., § 237, note 3.

We find nothing in the record to lead us to the conclusion that appellees knew, when they filed their suit in the Wisconsin court, that the notes had been transferred and were then in the hands of innocent purchasers. These facts were developed by the answers. It is said in Gates v. Paul, 117 Wis. 170, 191, 94 N. W. Rep. 62, that "if one sues in equity in good faith and fails to establish his cause, but shows a state of facts entitling him to recover at law, the court, having rightfully obtained jurisdiction for a proper purpose, may retain the cause and grant just such relief as upon the facts the plaintiff appears entitled to, whether at law or in equity." To the same effect is the ruling in the case of Milkman v. Ordway, 106 Mass. 232, 253. See also 1 Pom. Eq. Jur., § 237, note 3. In our opinion the better reasoning and the weight of authority is against appellant's contention and supports the ruling of the trial court.

The last reason in support of appellant's motion for a new trial is that the judgment is excessive. After a careful examination of the record upon this question we are of the opinion that the ruling of the trial court in this particular was right.

Finding no error in the record, the judgment is affirmed.

NOTE.—*Domestic, Sister State and Foreign Judgments.*—The distinctions between the classes of judgments are rapidly disappearing. Convenience is one of the great factors of the law, and its influence has made great inroads upon the various kinds of judgments. For the domestic judgment there are presumptions of regularity. There are cases which hold these are conclusive. But the better rule seems to be that they are open to collateral attack or to impeachment for defects of jurisdiction of either the person or the subject-matter. The maxim *omnia praesumuntur rite et solemter esse acta* has limitations. These are extensively discussed in Hughes' Proc., secs. 110-119; also pp. 1066-1067. But this presumption formerly did not attach to sister state, foreign and inferior judgments. For these, jurisdictional facts were not presumed, nor are they now presumed for a domestic judgment when it is offered to prove an estoppel of record or a title founded upon the proceedings. Here the jurisdictional facts must affirmatively appear. Whart. Ev. 824, and cases cited. Every presumption against a pleader was applied here. Estoppels are odious. The presumptions of regularity only attended when the judgment was sued on in debt.

The full faith and credit clause is involved in sister state judgments. These must be evinced by the foundation, the same as in proving an estoppel or title, as already mentioned. The judiciary act prescribed how the record should be made up and authenticated. 1 Greenleaf, Ev. 501-503; Bouv. Dict., Foreign Judgment.

Wherever the presumption of regularity attaches as for instance to the domestic judgment when it is sued on in debt, there the full faith and credit clause is of no consequence. For there is witnessed not hostility among the states, but a fraternal sisterhood embraced and upheld not contemplated by the framers of the government. These intended that the foundation record should attend the formal judgment entry and affirmatively show its jurisdictional facts. When so evinced the judgment could only be assailed for jurisdictional defects, as is shown in the cases cited in Haddock v. Haddock, 201 U. S. 562. The inferior judgment must show upon the face of the judgment entry the jurisdictional facts. Hereon and herein these facts must affirmatively appear. Kempe v. Kennedy, 5 Cranch (U. S.), 173, 3 L. Ed. 70; Hughes' Procedure, *supra*. But some cases have presumed regularity for justices' judgments, as in John v. State (1885), 104 Ind. 557, 6 Am. Crim. Rep. 569. Such decisions put inferior judgments on the same footing as judgments of superior courts. When they do, it seems to logically follow that they should so treat the inferior judgment from the sister state. In states where pleadings and the foundation matter of judgments are waived or departed from (2 Thomp. Trials, secs. 2310-2311), there the judgment entry only would or could be of any consequence. Under such a doctrine it is immaterial whether the judgment rested upon the allegations, the admissions and issues or not. Departing from them is of no consequence. Under that doctrine departures, variances and usurpation would not vitiate the judgment nor render it subject to collateral attack.

The student will do well to familiarize himself with a few maxims and consider them collectively, and also in connection with the foregoing observations. One is already presented. The others are: Every presumption is against a pleader; what is not juridically presented cannot be judicially considered; consent cannot confer jurisdiction of subject-matter; the pleadings cannot be waived; the allegations and proof must correspond; it is vain to prove what is not alleged. The foregoing rules are extendedly discussed in the Duchess of Kingston's case and note in Smith's Leading Cases (8th Ed.), p. 734, Vol. 2. It is absolutely certain that the Appellate Court of Indiana has departed from fundamental principles, as is shown in the principal case.

JETSAM AND FLOTSAM.

GREATEST OF EXPOSITIONS.

Of all exhibitions held in the United States since the Philadelphia centennial in 1876, the Jamestown ter-centennial, to be held on the shores and waters of Hampton Roads, near the cities of Norfolk, Portsmouth and Newport News, Va., April 26 to November 30, 1907, is to be the most unique, and in originality and novelty will completely eclipse all previous expositions. The celebration commemorates the most important event in history—the founding of the first English-speaking settlement in America, at Jamestown, Va., in 1607, where Captain John Smith and a small party of colonists established a village from which has grown America, with nearly one hundred million population. The celebration will show the remarkable position attained by the United States in history and education, together with the marvelous industrial development and commercial expansion during three hundred years. Contemporaneous with the exposition will be held in the waters of Hampton Roads the greatest naval pageant ever witnessed in the world, in which every type of war vessel from the navies of all foreign nations will participate. Another attractive feature will be the international military

encampment in which detachments of troops of European countries will unite with the soldiers of the United States in a series of drills, maneuvers, parades, etc.

The site of the exposition is located within twenty minutes' ride of the tidewater cities of Virginia, reached either by trolley or steamer, and nature has combined with the ingenuity of man in making a beautiful and picturesque spot. The grounds cover more than 400 acres, with two miles of water front facing the greatest waterway in the world, and commands an unsurpassed view of innumerable points of national and historic interest.

The scheme of landscape decoration will be novel and elaborate, one of the attractive features being the floral fence which surrounds the ground. It is made of trumpet vines, trained and meshed wire, intertwined with honeysuckle and crimson rambler roses, the effect being an artistic triumph of flowering beauty.

More than twenty-five exhibit palaces are now nearing completion, comprising auditorium, manufacture and liberal arts, mines and metallurgy, marine appliances, machinery food products, arts and crafts, transportation, social economy, etc., in addition to the government and states buildings and pavilions. They will be of semi-permanent construction and in appointments will excel any similar group of buildings ever erected. In architecture they will all be of the colonial period, forming an appropriate setting to the natural beauties of the environment.

Another attractive feature will be the government pleasure pier extending 2,000 feet into Hampton Roads. At either end it will be surmounted with light towers and a working exhibit of wireless telegraphy. The entire structure will be illuminated by thousands of arc and incandescent electric lights, affording an unexcelled view of the naval display. Amusements have not been lost sight of, and the "Warpath," covering more than a mile, will offer a diversified class of original novelties.

In assembling the exhibits, especially those representing the varied industries and the liberal arts, the managers of the exposition have been careful to select only such as show the latest and best attainments in every line of industry. Hence, it will be the first "selective" exposition ever held in the United States, in which every phase of commercial and industrial development will be displayed so arranged and classified that visitors may obtain an intelligent understanding of the history and growth of any specific branch of the trades and industries, without the necessity of visiting other buildings to inspect another part of the same exhibit.

Many reasons combine to make the celebration the most successful ever attempted, and when President Roosevelt touches an electric button April 26, of next year, signifying the formal opening of the gates, the thousands of visitors will not be disappointed in the wonders and attractions of the Jamestown tercentennial.

CORRESPONDENCE.

LIABILITY OF MASTER OF MINE FOR DISCHARGES FROM "MISSED HOLES."

Editor of the Central Law Journal:

In your issue of November 16, 1906, I note under the heading of "Important Decisions," a review of the case of Bone v. Ophir S. M. Co. (Cal.), 86 Pac. Rep. 685. The case bears upon the question of the master's liability for injury to a servant from a "missed hole" or as the result of unexploded charges of giant powder or dynamite. Those familiar with mining know that after a lot of holes are drilled in the breast or wall of a tunnel, these holes are filled with charges of giant powder and the fuse lit. This is generally done at the end of a "shift" so that the smoke may clear away before the next "shift" goes to work. It is not uncommon that one of these charges, for some reason, does not explode. The next "shift" comes on to work without any knowledge of a "missed hole." And it is certain that the fellow-servants on the off-going shifts are not guilty of negligence because they failed to count the discharges to see whether or not every hole was exploded, or if one had failed to explode, to wait after their shift is ended, to inform the on-coming shift. The result is that some faithful fellow on the on-coming shift, without the least warning, and without any opportunity of discovering his danger, in the course of his work, drives his pick into the unexploded charge, and the streets of every mining city, dotted here and there with a person whose sight is gone and whose powder-marked face tells the cause, is a living illustration of the result of such an occurrence. The question naturally is, who ought to be held responsible?

It seems that there are two lines of decisions, one holding the master liable, and the other not, and the Supreme Court of the state of Montana, in holding exempt the mining companies, says: "But however this may be, we are of the opinion that the rule adopted by this opinion is based upon the better reasons and is better adopted to the condition of this state where the mining industry is of such vast importance. Any other doctrine would place the master in the position of an insurer." Shaw v. New Year G. M. Co., 77 Pac. Rep. 516.

It is this particular expression and the reason suggested which behooves me to call your attention to this subject, for I think that it has never been treated in a thorough manner. The above reasoning seems to be based on the proposition that it is better for the interests of the state to let the unfortunate cripples for life beg, go to the poor house, or get along any old way, rather than compel the mining companies to compensate him for his injuries, presumably for the reason that if any other rule adopted, it might tend to keep capital from the state and thus injuriously affect the important "mining industry." Obviously a very satisfactory view for every one except the unfortunate one. When we consider that he was entirely without fault and entirely unable to protect himself from such a misfortune, it seems hard that he should be made to bear the entire consequences of such a misfortune. To this vast army of unfortunates, as well as to the legal profession, it is due that this question should be correctly settled.

All experienced miners will testify that it is easy, at a safe distance, to count the number of explosions and thus ascertain whether the total number of charges had exploded. It, therefore, seems to me that if a suit of this kind was brought on this theory, and alleging as the grounds of negligence that the master failed to make, promulgate and enforce such rules as would result in informing the servants of the existence of "missed holes" and those allegations were proven, it would be sufficient to hold the master liable. This point was raised in the Shaw case, *supra*, but held without merit. Probably not sufficient evidence was introduced along the line that such a rule was necessary and that its adoption, pro-

mulgation and enforcement would probably have prevented the accident. It seems to me that the adoption of such a doctrine would prevent many of the injuries resulting from "missed holes," and certainly this degree of care ought to be required of the master. The Supreme Court of the United States has said: "Occupation, however important, which cannot be conducted without necessary danger to life, body or limb, should not be prosecuted at all without reasonable precaution against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle, that in all occupations which are attended with great and unusual dangers, there must be used all appliances readily attainable known to science for the prevention of accidents." Mather v. Rillston, 15 Sup. Ct. Rep. 464. If the doctrine were established that it is the master's duty to discover whether there are any "missed holes," and to warn the servant thereof, the harshness of the present rule would be considerably abated. The master's duty and liability, in case he knows of the "missed hole," is discussed in Allen v. Bell, 79 Pac. Rep. 582.

As far as I have been able to ascertain, no note in any of the annotated reports cover this subject, nor have I found any satisfactory discussion of it in any of the law journals. To the end that this ground may be covered by some one competent to do so, I have written you this letter. ALEXANDER MACKEL.

Butte, Mont.

BOOKS RECEIVED.

Report of Illinois State Bar Association, 30th Annual Meeting. Edited by John F. Voight, Jr. Illinois State Register Book Publishing House, Springfield, Ill.

HUMOR OF THE LAW.

Business was dull, debtors were shy and wary, and Tim, the process server, was playing in hard luck. A case was on the list for trial in which an important witness named Reardon had defied all efforts to summon him. At last recourse was had to Tim, who was told to get a service in hand.

Tim took the writ and started on his errand. On the road he met Reardon's dog. The dog had a small package in his mouth, and a bright idea at once struck Tim. "Come here, my good fellow," said Tim, caressing the dog in a friendly manner. Tim untied the bundle and placed the summons securely within, and then the dog took up the package and scampered away to his destination. Tim followed at a respectable distance, watched the dog go into the house, saw his master undo the package, and saw the legal paper fall immediately into his grasp.

"That's the copy," joyfully exclaimed Tim, peering forth from his hiding place under the window, "and here is the original."

Tim returned his writ to court, and the court decided after hearing an objection that the service was valid.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Executory Agreement.—Contract to pay a certain sum less than a sum formerly agreed to be paid, but the payment of which is contingent and unmatured, held binding, though not executed.—Bandman v. Finn, N. Y., 78 N. E. Rep. 175.

2. ACTION- Enforcement of Trust.—Where different persons convey their property in trust to secure the same debt, it is not a misjoinder of causes to unite them all as parties in a single action.—Michigan Trust Co. v. Frymark, Neb., 107 N. W. Rep. 760.

3. ADVERSE POSSESSION- Constructive Possession.—Where two patents to land overlap, possession taken under the junior patent outside the lap is not adverse possession as to land within the lap.—Bates v. Collins, Ky., 93 S. W. Rep. 615.

4. ANIMALS — Transfer of Brand. — Under contract whereby defendant sold his brand to plaintiff, defendant to have his horses on the range, plaintiff to be the judge, plaintiff could not arbitrarily determine that an animal belonging to defendant was not his.—Belknap v. Belknap, S. Dak., 107 N. W. Rep. 692.

5. APPEAL AND ERROR—Defects in Record.—A party applying for the correction of a record on a writ of error must make his application without delay after discovering the incorrectness, and show that its condition is not attributable to a want of diligence.—Vineyard v. McCombs, Tex., 93 S. W. Rep. 482.

6. APPEAL AND ERROR—Exclusion of Evidence.—Exclusion of parts of deposition in action to have will declared void held without injury where parts excluded were insufficient to sustain a finding against validity of will.—Pringle v. Burroughs, N. Y., 78 N. E. Rep. 150.

7. APPEAL AND ERROR—Theory of Case in Trial Court.—The theory on which an action to recover as escheated property land of which an alien died *seised* was tried in the lower court must be pursued on appeal.—Donaldson v. State, Ind., 78 N. E. Rep. 182.

8. APPEAL AND ERROR—Transcript.—A transcript on appeal should contain the judgment sought to be reversed and such other matters as may be necessary to present the ruling to be reviewed.—Fike v. Ott, Neb., 107 N. W. Rep. 774.

9. APPRENTICES—Enticing Away an Apprentice.—The circuit court has no jurisdiction of a petition for a mandatory injunction directing a person who has the unlawful custody of an apprentice to surrender him to the master.—Brook v. Whittaker, Ky., 93 S. W. Rep. 623.

10. ASSAULT AND BATTERY — Provoking Assault. — Though plaintiff assaulted defendant, defendant after repelling the assault was not justified in following up plaintiff, who was retreating and further assaulting him for the purpose of chastisement.—Brouster v. Fox, Mo., 93 S. W. Rep. 318.

11. ATTORNEY AND CLIENT—Right to Lien.—Attorneys successfully defending a suit to recover land held not

entitled to a lien on the land under Ky. St. 1903, § 107.—Lytle v. Bach & Miller, Ky., 93 S. W. Rep. 608.

12. ATTORNEY AND CLIENT—Unconscionable Contract.—Whether a contract to pay an atttorney half the recovery for prosecuting an action is unconscionable held to depend on the circumstances of each case—Morehouse v. Brooklyn Heights R. Co., N. Y., 78 N. E. Rep. 179.

13. BILLS AND NOTES—Bona Fide Indorsee.—A *bona fide* indorsee of a draft before maturity held protected against defenses available against the maker, though guilty of gross negligence in failing to discover such defenses, etc.—Bradwell v. Pryor, Ill., 77 N. E. Rep. 1115.

14. BILLS AND NOTES—Plea of Nil Debit.—A defendant sued on a note in justice's court may, under his oral plea of *nil debit*, show that he did not owe the debt.—Dawson v. Owen, Ark., 93 S. W. Rep. 567.

15. BUILDING AND LOAN ASSOCIATIONS—Liability of Borrowing Member.—A borrowing member of a building association paying 6 per cent. interest on a debt including a mortgage drawing 5 per cent. assumed by the association held not entitled to a credit for the excess of interest paid on the debt.—Preston v. Rockey, N. Y., 77 N. E. Rep. 1156.

16. CANCELLATION OF INSTRUMENT—Conditions Precedent.—In a suit by an heir who had conveyed her interest in the estate's real estate to the administrator held not necessary for her to offer to return the consideration paid to her.—Reeder v. Meredith, Ark., 93 S. W. Rep. 558.

17. CARRIERS—Injury to Freight by Flood.—A common carrier held responsible for injuries to freight by a flood.—Wabash R. Co. v. Sharpe, Neb., 107 N. W. Rep. 758.

18. CARRIERS—Injury to Passengers.—Where it appears, in an action against a common carrier for a personal injury, that some defect in the appliances or some act of the employee's contributed to the accident, a presumption of negligence arises on the part of the carrier.—Lincoln Traction Co. v. Shepherd, Neb., 107 N. W. Rep. 764.

19. CARRIERS—Injury to Trespasser.—The operatives of a train held not negligent in failing to use the emergency brake after learning of the presence of a trespasser on the steps of a passenger car.—Graham v. Chicago & N. W. Ry Co., Iowa, 107 N. W. Rep. 595.

20. CARRIERS—Passengers.—A passenger on a railroad train who has purchased a ticket to a certaint point, but on reaching such point decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter or notify the conductor of his purpose to proceed.—Anderson v. Missouri Pac. Ry. Co., Mo., 93 S. W. Rep. 394.

21. CARRIERS—When Relation of Passenger Begins—One who has not presented himself at any place provided by a railway company for the reception of passengers held not a passenger being transported and under protection of the statutes of the state.—Hicks v. Union Pac R. Co., Neb., 107 N. W. Rep. 798.

22. CARRIERS—Who are Passengers.—An employee of a railroad company traveling on a train pursuant to a direction of the company was entitled to protection as a passenger—Johnson v. Texas Cent. R. Co., Tex., 93 S. W. Rep. 433.

23. CEMETERIES—Right to Sepulcher.—Only testator, his widow, his children by both marriages, and their descendants held entitled to sepulchre in a cemetery lot purchased by testator's executors.—Robertson v. Mt. Olivet Cemetery Co., Tenn., 93 S. W. Rep. 574.

24. CENSUS—Time of Taking Effect.—The fifth decennial census of Minnesota went into legal effect upon its compilation and publication by the superintendent of the census, and not upon the deposit of the enumeration in his hands.—Wolfe v. City of Moorhead, Minn., 107 N. W. Rep. 728.

25. CONSTITUTIONAL LAW—Appointment of Equalization Tax Commission.—Rev. St. 1898, §§ 1077a, 1077b, providing for the appointment of equalization commissioners to equalize taxes between different municipalities in counties, held not unconstitutional as an unwarranted delegation of legislative power.—Foster v. Rowe, Wis., 107 N. W. Rep. 635.

26. CONSTITUTIONAL LAW—Double Damages for Conversion of Ore.—Code, § 2485, making an operator of a mine taking coal without permission from adjoining land liable in double damages therefor, is not violative of the fourteenth amendment to the federal constitution, prohibiting any state from depriving any person of property without due process of law, or depriving any one within its jurisdiction of the equal protection of the laws.—Mier v. Phillips Fuel Co., Iowa, 107 N. W. Rep. 621.

27. CONSTITUTIONAL LAW—Due Process in Tax Sales.—The provision of the tax law authorizing the foreclosure of the lien of the state and sale without service of process does not render the act unconstitutional—Toolan v. Longyear, Mich., 107 N. W. Rep. 699.

28. CONSTITUTIONAL LAW—Due Process of Law.—Code Cr. Proc., § 392, providing for the admission of the unsworn statement of children under 12 years of age in criminal cases, held not unconstitutional as a deprivation of life or liberty without due process of law.—People v. Johnson, N. Y., 77 N. E. Rep. 1164.

29. CONSTITUTIONAL LAW—Impairment of Contract Obligations.—The reserved right to alter, amend, or repeal corporate charters, given by Const. Miss. 1890, § 178, held not to authorize legislature to empower city to construct waterworks during the term of an exclusive waterworks franchise possessed by a private corporation.—City of Vicksburg v. Vicksburg Waterworks Co., U. S. S. C., 26 Sup. Ct. Rep. 660.

30. CONSTITUTIONAL LAW—Impairment of Contract Obligations—Mere understandings must give way before the exercise of the police power of the state in regulating the affairs of its municipal corporations as against the claim that such legislation will impair the obligation of contracts.—School City of Marion v. Forrest, Ind., 78 N. E. Rep. 187.

31. CONSTITUTIONAL LAW—Income Tax.—The tax on the gross receipts of railroads imposed by Sess. Laws 1905, p. 336, ch. 141, if regarded as an income tax, is unconstitutional as class legislation.—Galveston, H. & S. A. Ry. Co. v. Davidson, Tex., 93 S. W. Rep. 436.

32. CONTRACTS—Joint Debtors.—Though a valid defense as to one of two joint obligors inures to the benefit of both, when such defense is infancy, the infant may be discharged and a recovery had against his co-obligor.—Cole v. Manners, Neb., 107 N. W. Rep. 777.

33. CONTRACTS—Offer and Acceptance.—A contract is concluded where the offer is accepted within a reasonable time, either by telegram or letter.—Burton v. United States, U. S. S. C., 23 Sup. Ct. Rep. 688.

34. CONTRACTS—Usury.—A contract with a foreign building association authorized to do business in the state when the contract is made does not become unenforceable by failure of the association to renew its authority to transact business.—Eastern Building & Loan Ass'n v. Tonkinson, Neb., 107 N. W. Rep. 762.

35. CORPORATIONS—Dissolution.—After the dissolution of a corporation, an action may be maintained in the corporate name on a cause of action which accrued to the corporation.—Lincoln Butter Co. v. Edwards Bradford Lumber Co., Neb., 107 N. W. Rep. 797.

36. CORPORATIONS—False Representation as to Character of Stock.—The representation by a director that the stock of the corporation is paid up and non-assessable, even though merely expressive of an opinion that under the law the shares or certificates could not be taxed or assessed, does not obviate the misstatement that the stock is fully paid.—Hinckley v. Sac. Oil & Pipe Line Co., Iowa, 107 N. W. Rep. 629.

37. CORPORATIONS—Pledges of Stock.—Pledgee of corporate stock held justified in regarding request of pledgors as directors of corporation levying assessment as personal assent on their part to payment of assessment by pledgee.—Iowa Nat. Bank v. Cooper, Iowa, 107 N. W. Rep. 625.

38. COURTS—Questions of Fact.—A finding of fact by the trial court, even in an equity case, will, on appeal, be given some weight and consideration where conflicting oral evidence was introduced before it.—Iowa Nat. Bank v. Cooper, Iowa, 107 N. W. Rep. 625.

39 COVENANTS—Party Wall Agreement.—The right of one building a party wall to recover one half the price from an adjoining owner held a covenant running with the land to the grantee.—Rugg v. Lemly, Ark., 93 S. W. Rep. 570.

40. CRIMINAL EVIDENCE—Confessions.—A confession held receivable in evidence if made in such proximity to a warning that it reasonably appears that the person making it was at the time mindful of the warning.—Stephens v. State, Tex., 93 S. W. Rep. 545.

41. CRIMINAL EVIDENCE—Failure of Accused to Testify.—Refusal to charge that the failure of accused to testify does not raise a presumption of guilt, as provided by Comp. Laws 1897, § 10,211, held reversible error.—People v. Provost, Mich., 107 N. W. Rep. 716.

42. CRIMINAL EVIDENCE—Instructions—In prosecution for theft, where taking is proved by positive testimony and other circumstances by circumstantial evidence, charge on circumstantial evidence held unnecessary.—Nixon v. State, Tex., 93 S. W. Rep. 555.

43. CRIMINAL EVIDENCE—Waiver of Preliminary Examination.—One pleading not guilty to an information, without raising the objection of want of examination, waives the objection.—People v. Harris, Mich., 107 N. W. 715.

44. CRIMINAL LAW—Accomplice of Perjurer.—The officer administering the oath held not an accomplice to the offense of false swearing because of knowledge of the falsity of the affidavit.—Wilson v. State, Tex., 93 S. W. Rep. 547.

45. CRIMINAL TRIAL—Appeal Before Sentence.—Where no sentence was pronounced or judgment rendered on the verdict of conviction, the appeal will be set aside and the cause remanded with directions to pronounce sentence and enter judgment—State v. Clapper, Mo., 93 S. W. Rep. 384.

46. CRIMINAL TRIAL—Burglary.—The court on a prosecution for daytime burglary held not required to differentiate between the force used in a daytime and nighttime burglary.—Wright v. State, Tex., 93 S. W. Rep. 548.

47. CRIMINAL TRIAL—Continuance.—The refusal to grant a continuance in a criminal case on the ground of the absence of witnesses held not erroneous in view of what such witnesses would prove.—Johnson v. Commonwealth, Ky., 93 S. W. Rep. 581.

48. CRIMINAL TRIAL—Homicide.—Where, in a prosecution for homicide, a statement made by the accused before trial was introduced with his consent, the jury were at liberty to believe a portion thereof and reject the balance.—People v. Johnson, N. Y., 77 N. E. Rep. 1164.

49. CRIMINAL TRIAL—Incest.—Prosecutrix in incest is an accomplice if she submitted to the acts o s exual intercourse, though unwillingly, and with the same intent and purpose as defendant.—Pate v. State, Tex., 93 S. W. Rep. 556.

50. CRIMINAL TRIAL—Instructions as to Larceny.—In prosecution for theft of horse, charge that evidence concerning theft of saddle could only be used in judging of the intent of accused as to the theft of the horse held proper.—Hammock v. State, Tex., 93 S. W. Rep. 549.

51. CRIMINAL TRIAL—Instructions as to Presumption of Innocence.—It is not reversible error to refuse an instruction stating the presumption of innocence when the court has fully instructed on the doctrine of reasonable doubt.—State v. Maupin, Mo., 93 S. W. Rep. 879.

52. CRIMINAL TRIAL—Remarks by Court.—Remarks by the court reflecting on the testimony of the expert witness will not be held prejudicial if there is nothing rendering the expert evidence applicable.—Haddix v. State, Neb., 107 N. W. Rep. 781.

53. DEDICATION—Public Park.—The rendition of certain property for taxation, and payment of taxes thereon by one who had described the property as a park on a plat and sold lots by reference to the plat, held not to have interfered with the dedication.—Sanborn v. City of Amarillo, Tex., 93 S. W. Rep. 473.

54. DOWER—Rights of Widow.—A widow cannot recover rent for withholding her dower prior to demand for its assignment.—Hyatt v. O'Connell, Iowa, 107 N. W. Rep. 599

55. EMBEZZLEMENT—Elements of Offense.—Vendor of land who failed to apply part of price to satisfaction of vendor's lien note in accordance with agreement with purchaser held guilty of embezzlement.—Cowan v. State Tex., 93 S. W. Rep. 553.

56. EVIDENCE—Abandoned Pleadings.—Defendant's abandoned answers in an action for slander held admissible against him as admissions.—Overton v. White, Mo., 93 S. W. Rep. 363.

57. EXECUTION—Garnishment.—Persons garnished held not affected by the subsequent indorsement on the execution that it had been revived.—Commercial Real Estate & Brokerage Co. v. Riemann, Mo., 93 S. W. Rep. 305.

58. EXECUTION—Action to Set Aside Sale.—Where property was sold under an execution to a purchaser other than the judgment creditor, the execution of a receipt by the latter to the sheriff for the price, without actual payment by the purchaser, held insufficient to pass title.—Fuller v. Exchange Bank, Ind., 78 N. E. Rep. 205.

59. EXECUTORS AND ADMINISTRATORS—Ancillary Administration.—Where administration has been granted in two or more states, that granted in the state of the domicile of the deceased is the principal administration and the other ancillary.—*In re* William's Estate, Iowa, 107 N. W. Rep. 608.

60. EXECUTORS AND ADMINISTRATORS—Claims Against Estate.—In proceedings to establish a claim against a decedent's estate, an instruction authorizing the jury to consider services rendered by plaintiff for which decedent knowingly received the benefit held not objectionable as excluding the issue of implied contract.—Hammer v. Crawford, Mo., 93 S. W. Rep 348.

61. EXECUTORS AND ADMINISTRATORS—Management of Estate.—Executors held not chargeable with interest on sums lost, owing to their having in carrying on the business of testator sold goods on time without security.—Peterman v. United States Rubber Co., Ill., 77 N. E. Rep. 1108.

62. FORGERY—Elements of Offense.—To constitute forgery, the name signed must be that of some other person than he who executes the instrument.—Murphy v. State, Tex., 93 S. W. Rep. 513.

63. FRAUD—Representations.—A statement relied on by plaintiff in making a sale of stock held not a statement by defendant which would authorize a setting aside of the sale.—Goodwin v. Daniel, Tex., 93 S. W. Rep. 534.

64. FRAUDS, STATUTE OF—Part Performance.—Part performance on the part of a vendor, including surrender of possession, and full performance of the vendee, removes a parol agreement for the sale of real estate from the operation of the statute of frauds.—Morrisson v. Gosnell, Neb., 107 N. W. Rep. 753.

65. FRAUDULENT CONVEYANCES—Evidence.—On an issue as to the *bona fides* of a sale of a stock of merchandise, evidence that the seller had offered the stock to others once about two months and once about six weeks before the transfer held inadmissible.—McCuin v. Merchant Grocery Co., Ark., 93 S. W. Rep. 563.

66. FRAUDULENT CONVEYANCES—Secret Trust.—A secret trust for the purpose of defrauding the grantor's creditors will not be enforced either in law or equity—Gillum v. Kirksey, Ky., 93 S. W. Rep. 591.

67. GARNISHMENT—Notice.—Statement of requisite of return on notice of garnishment.—Commercial Real Estate & Brokerage Co. v. Riemann, Mo., 93 S. W. Rep. 305.

68. GOOD WILL—Breach of Conditions.—On sale of a newspaper business, where the vendor stipulated not to engage in the same business within certain limits within the next 10 years, held in an action for breach, evidence sustained a verdict for plaintiff.—Skinner v. Wilson, Neb., 107 N. W. Rep. 771.

69. GRAND JURY—Excusing a Grand Juror.—Where a grand juror was excused and another placed on the grand jury in his place, held that any action of the jury participated in by him was a nullity.—*Ex parte* Love, Tex., 93 S. W. Rep. 551.

70. HAWKERS AND PEDDLERS—License.—Sale of coal oil from a wagon held not violation of Ky. St. 1903, § 4215, requiring peddlers to obtain license.—Commonwealth v. Standard Oil Co., Ky., 93 S. W. Rep. 613.

71. HOMESTEAD—Conveyance.—Agreement by debtor that creditor should take deed to land occupied as homestead and hold same as security for indebtedness other than purchase money, held void.—Blake v. Lowry, Tex., 93 S. W. Rep. 521.

72. HOMICIDE—Duel.—Where one, under color of fighting upon equal terms with another, uses a deadly weapon without the other's knowledge, and kills, it amounts to murder.—State v. Maupin, Mo., 93 S. W. Rep. 379.

73. HOMICIDE — Instructions. — Where defendant is found guilty of murder in the second degree only, prejudice will not be presumed because of instructions repeating principles of law applicable to the issue of murder in the first degree.—Haddix v. State, Neb., 107 N. W. Rep. 781.

74. HOMICIDE—Justification.—A person has no authority to kill another to prevent a mere trespass arising from the attempt of the latter to arrest the former without authority under a warrant.—Neeley v. Commonwealth, Ky., 93 S. W. Rep. 596.

75. HUSBAND AND WIFE—Agency of Husband.—A wife, having permitted her husband to take and transfer notes secured by mortgage in her name, held bound by his act in receiving payment from the maker.—Barry v. Stover, S. D., 107 N. W. Rep. 672.

76. INCEST—Accomplice.—Prosecutrix in incest is an accomplice if she makes no active resistance to the act of intercourse, though she does not engage in it with the same intent and purpose as defendant.—Gillespie v. State, Tex., 93 S. W. Rep. 556.

77. INFANTS—Contracts.—While in possession of premises under a lease, the plea of infancy is not available in a suit to restrain the infant from irreparable injury upon the landlord.—Cole v. Manners, Neb., 107 N. W. Rep. 777.

78. INTOXICATING LIQUORS—Violation of Local Option Law.—On a trial for violation of the local option law, evidence as to accused's belief in the nonintoxicating properties of the drinks sold held inadmissible.—Henderson v. State, Tex., 93 S. W. Rep. 551.

79. JOINT ADVENTURES—Secret Agreement for Commissions.—One joining with another in the purchase of land without knowledge that such other was to receive back a portion of the purchase price as commissions held entitled to recover the portion of the commission paid by him.—Jordan v. Markham, Iowa, 107 N. W. Rep. 613.

80. JUDGMENT—Persons Concluded.—A foreign executor of a deceased administrator held bound by the judgment in an action by an administrator *de bonis non* against the surety on the deceased administrator's bond.—*In re* McCauley's Estate, 99 N. Y. Supp. 238.

81. JUDICIAL SALES—Caveat Emptor.—A purchaser of property on foreclosure of a mechanic's lien held not entitled to recover damages for injuries to the property by the owner between the date the lien became effective and the day of the sale.—Van Buskirk v. Summitville Min. Co., Ind., 78 N. E. Rep. 238.

82. JUDICIAL SALES—Fraud.—A foreclosure sale will be set aside where defendants discredited the proceedings by filing objections to the appraisement, where it is not even claimed they were filed in good faith.—Strode v. Hoagland, Neb., 107 N. W. Rep. 754.

83. LANDLORD AND TENANT—Right to Rents.—Rent for portion of a building held to issue from the realty, and not the personalty, so that the owner of the land was entitled to it as against the owner of the building.—Kemp v. Earp, Mo., 93 S. W. Rep. 342.

84. LIBEL AND SLANDER—Admissibility of Evidence.—In slander for calling plaintiff a thief, evidence tending to prove specific dishonorable acts on the part of plaintiff, not amounting to larceny, was inadmissible.—Yager v. Bruce, Mo., 93 S. W. Rep. 307.

85. LIFE INSURANCE—Incontestibility.—A provision of incontestibility in a life policy held to have precluded the insurer from forfeiting the policy for fraudulent statements by insured.—Kansas Mut. Life Ins. Co. v. Whitehead, Ky., 93 S. W. Rep. 609.

86. LIFE INSURANCE—Insurable Interest.—Where policy shows relationship not creating insurable interest, burden held to be on beneficiary to show pecuniary interest.—Ryan v. Metropolitan Life Ins. Co., Mo., 93 S. W. Rep. 347.

87. LIFE INSURANCE—Presumptions as to Payment of Premium.—The presumption of the delivery of an instrument arising from possession thereof does not arise where on the face of the instrument some act remains to be done to make it complete.—Amos Richia v. Northwestern Mut. Life Ins. Co., Mich., 107 N. W. Rep. 707.

88. LIFE INSURANCE — Refusal to Reinstate Lapsed Policy.—Defendant insurance company held estopped by its conduct in relation to an application by insured for restoration of his life policy after lapse from setting up a forfeiture thereof.—Leonard v. Prudential Ins. Co., Wis., 107 N. W. Rep. 646.

89. LIMITATION OF ACTIONS—Express Trusts.—Limitations do not run against an express trust until there has been a repudiation thereof by the trustee with notice to the *cestui que* trust.—Bateman v. Ward, Tex., 93 S. W. Rep. 508.

90. LIMITATION OF ACTIONS—Running Accounts.—An agreed indebtedness for money loaned held not barred by limitations, where it was merely a part of a running account, the last item of which was not barred.—Hammer v. Crawford, Mo., 93 S. W. Rep. 348.

91. LIS PENDENS—Personal Property.—A person receiving a mortgage of personalty pending an action to recover the property or its value is not affected by the doctrine of *lis pendens*.—Calkins v. First Nat. Bank, S. Dak., 107 N. W. Rep. 675.

92. LOGS AND LOGGING — Boom Corporation. — Where a booming company is entitled to a lien for logs sorted and handled, it does not waive such lien by surrender and delivery of part of the logs handled during the season. — International Boom Co. v. Rainey Lake River Boom Corp., Minn., 107 N. W. Rep. 735.

93. MARINE INSURANCE — Presumptions as to Seaworthiness of Barge.—Where, in action on a policy insuring a barge, it appears that the barge was seaworthy when the policy was issued, it is to be presumed that it remained seaworthy until the time it sprang a leak and sank.—Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co., Mo., 93 S. W. Rep. 358.

94. MARRIAGE—Legitimacy of Children.—The issue of a customary marriage of slaves, not repudiated by either of the parties thereto, held legitimate children of the father.—Middleton v. Middleton, Ill., 77 N. E. Rep. 1123.

95. MASTER AND SERVANT — Assumption of Risk —A fireman injured in consequence of defects in the apron bridging the space between the engine and tender held not guilty of contributory negligence in failing to abandon the engine after the discovery of the defects.—Missouri, K. & T. Ry. Co. of Texas v. Dumas, Tex., 93 S. W. Rep. 493.

96. MASTER AND SERVANT—Care Required.—A master held not chargeable with negligence in maintaining a defective derrick hook, in the absence of evidence that the defect in the hook was discoverable by inspection.—New Castle Bridge Co. v. Steele, Ind., 78 N. E. Rep. 208.

97. MASTER AND SERVANT—Contributory Negligence.—In an action against a railway company for injuries to employee, the question of contributory negligence for failure to jump from the engine on which he was riding held for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Houlihan, Tex., 93 S. W. Rep. 495.

98. MASTER AND SERVANT—Contributory Negligence.—In an action for injuries to a switchman by the cornering of certain cars he was waiting to couple in the dark, plaintiff held not guilty of contributory negligence as a matter of law.—Phippin v. Missouri Pac. R. Co., Mo., 93 S. W. Rep. 410.

99. MASTER AND SERVANT—Wrongful Discharge.—In an action by a servant for wrongful discharge, he is not required to show the amount that he could or did earn after his discharge, but the burden to show the same is on defendant.—Pacific Express Co. v. Walters, Tex., 93 S. W. Rep. 496.

100. MASTER AND SERVANT—Defective Appliances.—Where the mousing of hooks in a pulley block might have rendered it safe, such mousing was not a duty to be performed as respects an unskilled workman having no knowledge of the facts.—Costello v. Frankman, Minn., 107 N. W. Rep. 739.

101. MASTER AND SERVANT—Defective Appliances.—An employee held not guilty of contributory negligence; he having no knowledge of a device adopted by the master being permitted to remain out of order.—Grand Trunk Western Ry. Co. v. Melrose, Ind., 78 N. E. Rep. 190.

102. MASTER AND SERVANT—Duty of Railroad Toward Construction Gang.—A railroad company held to owe no duty to a member of a construction gang to maintain a lookout on a flat car of the construction train while the same was in motion.—Burrman v. Grand Trunk Western Ry., Mich., 107 N. W. Rep. 709.

103. MASTER AND SERVANT—Fellow Servants.—A master held liable for injuries to a servant arising from the negligence of a fellow servant, unless the master failed to exercise ordinary or reasonable care in the selection of the latter servant.—Louisville & N. R. Co. v. Wyatt's Adm'r, Ky., 93 S. W. Rep. 601.

104. MASTER AND SERVANT—Injury to Property.—An experienced servant, having worked on a building for three weeks, held to have assumed the risk of injury by the falling of an angle iron upon him, which would have been prevented had flooring been inserted between the fifth and seventh floors, as required by St. 1901, p. 105, ch. 166.—Marshall v. Norcross, Mass., 77 N. E. Rep. 1151.

105. MASTER AND SERVANT—Safe Place to Work.—A master held not to have failed to furnish a safe place to work, when it was safe except as against negligence of fellow servants.—Brust v. J. T. Perkins Co., 99 N. Y. Supp. 212.

106. MASTER AND SERVANT—Torts of Servant.—In an action against a fishing club and its servant for an assault committed by the latter on the plaintiff in endeavoring to eject him from the fishing grounds, evidence that plaintiff had previously fished there without objection held admissible.—New Ellerslie Fishing Club v. Stewart, Ky., 93 S. W. Rep. 598.

107. MECHANICS' LIENS—Foreclosure.—Where the owner of property did not redeem from a sale on foreclosure of a mechanic's lien to a lien claimant, the latter's interest after the sale was that of purchaser independent of the lien.—Van Buskirk v. Summitville Min. Co., Ind., 78 N. E. Rep. 208.

108. MORTGAGES—Assignment.—A mortgage securing a nonnegotiable note held unenforceable as against a purchaser of the mortgaged premises who paid the mortgage to the payee's husband, without notice of an assignment thereof to plaintiff.—Barry v. Stover, S. Dak., 107 N. W. Rep. 672.

109. MORTGAGES—Purchase by City of Equity in Water Plant.—Contract of city for purchase of equity of redemption of water and lighting plant held not invalidated by execution of warranty deed to third person by grantor.—Connor v. City of Marshfield, Wis., 107 N. W. Rep. 689.

110. MORTGAGES—Sale by Trustee.—An owner of an undivided interest in land subject to a deed of trust held not entitled to control the method of sale by the trustee under the deed of trust.—Givens v. McGray, Mo., 93 S. W. Rep. 874.

111. MUNICIPAL CORPORATIONS—Defective Streets.—A city held not liable for negligently permitting a defect in a street, unless the defect caused an injury complained of.—City of Crawfordsville v. Van Cleave, Ind., 77 N. E. Rep. 1149.

112. MUNICIPAL CORPORATIONS—Removal of Mayor.—The action of the council of a city in removing the mayor for misconduct, after a hearing, will not be disturbed where the court cannot say that there was no evidence which the council, acting fairly, might not find sufficient to sustain the charges.—Riggins v. City of Waco, Tex., 93 S. W. Rep. 426.

113. MUNICIPAL CORPORATIONS—Validity of Appointment of Police.—A provision in a city charter for appointment of a chief of police and policemen by commissioners appointed by the governor is constitutional and valid.—*Ex parte* Tracey, Tex., 93 S. W. Rep. 538.

114. NEW TRIAL—Cumulative Evidence.—The policy of the law is to require a party to be diligent in securing his evidence when the cause is tried, and when alleged newly discovered evidence is merely cumulative, and unlikely to change the result, a motion for a new trial is properly denied.—*In re* McClellan's Estate, S. Dak., 107 N. W. Rep. 681.

115. PARTIES—Bailment.—A bailee of property, having an interest therein, may maintain an action to recover the value thereof against one through whose negligence it is lost.—Union Pac. R. Co. v. Meyer, Neb., 107 N. W. Rep. 793.

116. PARTNERSHIP—Contract with Individual Member.—In an action by a partnership on a contract alleged to have been assigned to it there can be no recovery by an individual member of the firm on a contract assigned to him as an individual.—Vanhoosier v. Dunlap, Mo., 93 S. W. Rep. 850.

117. PAYMENT—Application to Oldest Debt.—In the absence of any application to any particular debt made at the time a payment is made, the credit should be applied to the oldest debt.—Hammer v. Crawford, Mo., 93 S. W. Rep. 348.

118. PAYMENT—Effect of Extending Time for Paying Note.—Extension by payee of time for payment of notes to one who had assumed payment thereof without knowledge or consent of maker held to release maker.—Long v. Patton, Tex., 93 S. W. Rep. 519.

119. PLEDGES—Assignment by Pledgor.—In an action by an assignee of the rights of insured for balance of proceeds of policy held by bank, issue held to be confined to indebtedness to bank at time of notice of assignment.—Tharp & Griffith v. Porter & Waters, Tex., 93 S. W. Rep. 580.

120. PRINCIPAL AND SURETY—Rights of Sureties.—In action on note by pledgee of corporate stock as collateral, sureties held entitled to have proceeds of sale of certain stock applied in extinguishment of note.—Iowa Nat. Bank v. Cooper, Iowa, 107 N. W. Rep. 625.

121. QUIETING TITLE—Mortgage Barred by Limitations.—A debtor in an action instituted in his own behalf is not entitled to plead limitations, in an action to relieve his property from a trust relation, in the absence of fraud, unless the conditions of the trust have been performed.—Michigan Trust Co. v. Frymark, Neb., 107 N. W. Rep. 760.

122. RAILROADS—Fires.—A railroad company held liable for fire communicated by a passing locomotive to combustible material permitted to remain on the right of way, which fire spread to adjoining lands.—Baltimore & O. S. W. R. Co. v. O'Brien, Ind., 77 N. E. Rep. 1131.

123. RAILROADS—Fires Set by Locomotives.—In an action for injuries to growing trees by fire set by locomo-

tive, the measure of damages is the value of the trees with reference to the land in which they stood prior to the damage less their value afterwards.—Union Pac. R. Co. v. Murphy, Neb., 107 N. W. Rep. 757.

124. RAILROADS—Frightening Horses.—A railroad company held liable for injury to a person by the frightening of his horse by negligence of a section crew in placing a hand car on the track as he was about to cross at a private crossing.—Houston & T. C. R. Co. v. Beard, Tex., 93 S. W. Rep. 532.

125. RECEIVERS—Liability for Rent.—Receivers of the property of a lessee held liable for the rent, as expense of the receivership, having priority, which became payable during their occupancy.—Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., Mo., 93 S. W. Rep. 337.

126. RELEASE—Pleading.—A reply to an answer in a personal injury action averring a settlement held to sufficient plead *non est factum* as against a demurrer.—Indiana Union Traction Co. v. McKinney, Ind., 78 N. E. Rep. 203.

127. SALES—Contracts.—Under a contract of conditional sale of chattels on credit, the title to remain in the seller until fully paid for, where payments are not made as provided in the contract, the seller is entitled to the possession of the chattels.—Pels & Co. v. Cambridge Architectural Iron Works, Mass., 77 N. E. Rep. 1152.

128. SALES—Offer and Acceptance.—A written memorandum left with plaintiff by defendant's agent held not a mere price list, but a written offer to purchase, which plaintiff was entitled to ripen into an express contract by acceptance within the time specified.—Abrohams v. Revillon Freres, Wis., 107 N. W. Rep. 656.

129. SLAVES—Legitimacy.—A provision of Act Ky., Feb. 14, 1896 (Pub. Acts 1865-6, p. 37, ch. 556, § 2), held not to legalize customary marriages of slaves, but merely to confer on the issue thereof the right of legitimate children, and so to have no extra territorial force.—Middleton v. Middleton, Ill., 77 N. E. Rep. 1123.

130. STREET RAILROADS—Care Required of Motorman.—A street railway motorman on approaching a traveler compelled by a defect in the highway to drive on the track held bound to exercise the highest degree of care to avoid injuring him.—Indianapolis Traction & Terminal Co. v. Smith, Ind., 77 N. E. Rep. 1140.

131. STREET RAILROADS—Collision with Vehicle at Crossing.—The driver of an ordinary vehicle may cross a street railroad in the face of an approaching car if he has reasonable ground to believe that he can pass in safety.—Indianapolis St. Ry. Co. v. Bolin, Ind., 78 N. E. Rep. 210.

132. STREET RAILROADS—Duty to Pave Between Tracks.—That a street railway company complied with the terms of an order requiring maintenance of streets on which its tracks were laid held not to estop it from thereafter contesting the validity of the order.—Blodgett v. Worcester Consol. St. Ry. Co., Mass., 78 N. E. Rep. 222.

133. STREET RAILROADS—Injury to Child on Track.—In an action for the death of a child run over by a street car held not error to refuse to instruct on defendant's duty to equip its cars with fenders.—Hanley v. Ft. Dodge Light & Power Co., Iowa, 107 N. W. Rep. 598.

134. SUBROGATION — Discharge of Valid Lien. — The beneficiary of a trust deed covering land part of which was the grantor's homestead held entitled to be subrogated to the rights of holders of vendor's liens paid off with a part of the proceeds of the trust deed.—Flynt v. Taylor, Tex., 93 S. W. Rep. 423.

135. TAXATION—Property to be Transported Out of State.—Commodities intended for shipment out of the state are taxable within the state until they are actually delivered to a common carrier for transportation to the state of their destination, or actually launched on their way to such other state.—Ayer & Lord Tie Co. v. Keown, Ky., 93 S. W. Rep. 588.

136. TELEGRAPHS AND TELEPHONES—Right to Erect Poles.—Telegraph and telephone companies derive their right to erect their poles and string their wires along streets and highways directly from the state.—Village of Carthage v. Central New York Telephone & Telegraph Co., N. Y., 78 N. E. Rep. 165.

137. TRESPASS—Cutting Logs into Lumber.—Where a trespasser removes timber from land and converts it into lumber, the landowner is entitled to recover the value of the lumber.—C. R. Cummings & Co. v. Masterson, Tex., 93 S. W. Rep. 500.

138. TROVER AND CONVERSION—Evidence.—In an action for conversion of mules, statement that a certain person had run off with the mules and sold them to one of the defendants held relevant.—Huey v. Hammett, Tex., 93 S. W. Rep. 531.

139. TROVER AND CONVERSION—Sufficiency of Petition.—A petition alleging that plaintiff executed a deed on sale of land and placed it in escrow, and the grantee paid the money, and that defendant had it turned over to him and converted it to his own use, held not demurrable for failing to allege that plaintiff had title to the land sold.—Fike v. Ott, Neb., 107 N. W. Rep. 774.

140. TRUSTS—Money Loaned.—That one loaned money to another wherewith to buy land gives the lender no equity in the land bought therewith by the borrower.—Fike v. Ott, Neb., 107 N. W. Rep. 774.

141. WATERS AND WATER COURSES—Artificial Channels.—Where water is diverted from its natural channel to supply power for a mill, the mill owner must, under Comp. St. ch. 78, § 110, erect suitable bridges at any point where the canal crosses a public road.—Nuckolls County v. Guthrie & Co., Neb., 107 N. W. Rep. 779.

142. WATERS AND WATER COURSES—Maintenance of Embankment.—An owner who has maintained without objection for 30 years an embankment preventing surface water from overflowing his land is entitled to maintain the embankment at its original height.—Matteson v. Tucker, Iowa, 107 N. W. Rep. 600.

143. WEAPONS—Right to Carry.—Accused held entitled to carry a weapon, under Rev. St. 1899, § 1868, after he had been threatened with great bodily harm, if he in good faith believed the threat might be executed, though there was no danger thereof.—State v. Venable, Mo., 93 S. W. Rep. 356.

144. WILLS—Capacity of Testator.—In the absence of proof of insane conduct on the part of testator, insanity held not to be inferred from evidence that his ancestors or relatives were insane.—Pringle v. Burroughs, N. Y., 78 N. E. Rep. 150.

145. WILLS—Creation of Trust.—When words of recommendation or request contained in a will must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command.—Wolbert v. Board, Wis., 107 N. W. Rep. 668.

146. WITNESSES — Contradictory Statements. — On a prosecution for murder, held proper to permit the commonwealth to impeach one of its witnesses by showing statements out of court inconsistent with her testimony. Civ. Code Prac. § 596.—Garrison v. Commonwealth, Ky., 93 S. W. Rep. 594.

147. WITNESSES—Impeachment by Showing Conviction of Felony.—A copy of a judgment of conviction, showing the conviction of a witness of a felony, is admissible for the purpose of impeachment.—Gulf, C. & S. F. Ry. Co. v. Gibson, Tex., 93 S. W. Rep. 469.

148. WITNESSES—Redirect Examination. — To permit plaintiff to show on redirect examination that he was not guilty of a crime held not error in view of defendant proving plaintiffs conviction on his cross-examination. — Missouri, K. & T. Ry. Co. of Texas v. Dumas, Tex., 93 S. W. Rep. 493.

149. WITNESSES — Transactions with Decedent. — One who has a direct legal interest as one of several joint heirs in an action against a representative of a decedent held not incompetent to testify as to transactions between the deceased and an adverse party in whose claim the witness has no interest by Ann. Code 1901, § 329.—Hageman v. Powell's Estate, Neb., 107 N. W. Rep. 749.